In The
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-598

NELLIE MAE SPARKMAN,

Petitioner,

vs.

JAMES E. CARTER and EMPLOYERS SURPLUS LINES INSURANCE COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Cont'd)

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

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QUESTIONS PRESENTED

POINT I

DO THE MEDIATION PANEL PROVISIONS OF FLORIDA STATUTE §768.133, APPLICABLE TO MEDICAL MALPRACTICE ACTIONS, VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION?

POINT II

DOES FLORIDA STATUTE §768.133 VIOLATE THE DUE PROCESS PROVISIONS OF AMEND-

MENTS V AND XIV OF THE UNITED STATES CONSTITUTION?

POINT III

DOES FLORIDA STATUTE §768.133 VIOLATE PLAINTIFF'S RIGHT TO A TRIAL BY A JURY OF HER PEERS?

PETITIONER'S FAILURE TO SHOW REASONS FOR GRANTING CERTIORARI

The rules of this Court, specifically Rule 19.1, Rules of the Supreme Court, expressly state that review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. That same rule further provides that situations in which this Court's discretion will be exercised in favor of granting the petition are exemplified by state court decisions in which a federal question of substance has been determined in a manner probably not in accord with the applicable decisions of this Court or where a federal court of appeals has rendered a decision in conflict with that of another federal court of appeals in the same matter. Petitioner in the instant cause has not shown the existence of any of the grounds specified in Rule 19, nor any other compelling reason for this Court to exercise its discretion in Petitioner's favor. Rather, Petitioner relies on a purported conflict between decisions of the highest courts of two different states. It is accordingly submitted that the petition should be denied.

Petitioner attempts to assert a conflict between the decision of the Supreme Court of Florida in the instant cause and that of the Supreme Court of Illinois in *Wright v. Central*

DuPage Hospital Assn., 347 N.E.2d 736 (Ill. 1976), in which that court declared the Illinois malpractice act to be unconstitutional in various regards. Although the Supreme Court of Illinois in that decision held unconstitutional provisions of an Illinois statute providing for a medical mediation panel in malpractice actions, it must be emphasized that the basis of the decision in that regard was that the statute there in question violated the provisions of Article VI, §1 and §9, of Illinois' state constitution, for the reason that the Illinois statute there in question vested essentially judicial functions in nonjudicial personnel. The Illinois statute permitted the nonjudicial members of the medical review panel to exercise a judicial function by permitting the physician and lawyer members of the medical review panel to render conclusions of law over the dissent of the Circuit Judge member of the panel.

No attack on this basis is made in the instant proceedings, and indeed, no such attack could have been successfully maintained. The statute presently being considered expressly provides that the Circuit Judge sitting on the panel as judicial referee and presiding officer shall rule on limitations of the extent of discovery (Florida Statute §768.133(6)), and shall determine the type of medical specialist who should be on the panel in the event the parties do not agree. Florida Statute §768.133(2). The act further provides that the Supreme Court of Florida shall adopt procedural rules for the medical liability mediation panel, a provision which has been implemented by the Supreme Court of Florida in *In Re Transition Rule 21*, 316 So.2d 38 (Fla. 1975). Transition Rule 21(h), promulgated in that decision, expressly states that the judicial referee shall have the exclusive authority to rule on all matters of law and on the admissibility of relevant evidence as may be adduced by the parties, 316 So.2d at 39.. Accord-

ingly, the basis upon which the Illinois act was held to be unconstitutional is totally inapplicable to the Florida statute here in question.

Petitioner asserts that the Illinois act was held unconstitutional on the basis that it violated the equal protection and due process guarantees of the United States Constitution. However, Petitioner overlooks the fact that the Illinois court's statement as to these issues was merely dicta, the court having previously held the medical review panel provisions of the statute unconstitutional on state constitutional grounds before reaching these issues. Indeed, an examination of the decision reveals that the equal protection and due process arguments advanced in that cause were directed not to that statute's mediation panel provisions, but rather to a provision of the Illinois statute--not found in the Florida statute--limiting the amount of recovery in any medical malpractice action to $500,000. Thus, even if conflict between the decisions of the courts of two states is a basis for granting a petition for certiorari, the Illinois case relied upon by Petitioner simply is not in conflict with the decision of the Supreme Court of Florida.

The alternative basis asserted by Petitioner as a reason for this Court to grant certiorari in the instant cause is a plea that if the statute in question is not stricken down, it will establish a precedent for legislatures in other states to rely upon in enacting similar legislation. This, we submit, is clearly not a compelling reason for this Court to exercise its discretion in favor of granting the petition. Exactly the same argument could be made by any other petitioner seeking review of any decision of any state's highest court of appeals in which the constitutional validity of any statute was upheld. If the mere possibility that a statute might be used as a

draftsman's model by other legislatures after being held constitutionally valid were deemed a compelling reason for this Court to exercise its discretion in favor of granting a petition for certiorari, this Court would quickly find itself inundated with petitions for certiorari seeking review of every decision in which any state statute was upheld against constitutional assault. Clearly, this possibility of legislative copying does not present a compelling reason for this Court to exercise its discretion in favor of granting the petition within the meaning of Rule 19, Rules of the Supreme Court.

Accordingly, Respondents submit, Petitioner has shown no compelling reason for this Court to exercise its discretion in favor of granting the petition, and the petition should accordingly be denied.

ARGUMENT

POINT I

DO THE MEDIATION PANEL PROVISIONS OF FLORIDA STATUTE §768.133, APPLICABLE TO MEDICAL MALPRACTICE ACTIONS, VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION?

Petitioner claims that the provisions of Florida Statute §768.133 do violence to the Equal Protection Clause in that the statute singles out a particular group of tortfeasors and gives them favorable treatment and, apparently in the alternative, that the mediation panel provisions apply only to certain classes of health care providers, rather than all health care providers. Apparently as another alternative, Petitioner asserts that the mediation panel procedure violates the Equal Protection Clause by discriminating against malpractice plaintiffs in favor of defendant health care providers.

Before dealing with the specifics of Petitioner's arguments, certain basic principles should be noted. Statutory classification does not, in and of itself, violate the Equal Protection Clause simply because the law affects some groups differently than others, and the constitutional demand of the Equal Protection Clause does not include a requirement that a statute necessarily apply equally to all persons. *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Kotch v. Board of Riverport Pilot Commissioners*, 330 U.S. 552 *reh. den.* 331 U.S. 864 (1947). In order not to deny equal protection of the law, a statutory classification must rest upon some difference bearing a reasonable and just relationship to the statutory purpose, and a statutory classification having some reasonable basis does not offend the Equal Protection Clause even though it results in some inequality. *McLaughlin v. State of Florida*, 379 U.S. 184 (1964); *Morey v. Doud*, 354 U.S. 457 (1957). In passing on a contention that the Equal Protection Clause is contravened, the Court is not concerned with the soundness or wisdom of the distinctions drawn, it being enough that it was open to the state to believe them to be valid. *Safeway Stores, Inc. v. Oklahoma Retail Grocers' Assn., Inc.*, 360 U.S. 334 (1959). A statutory discrimination, in order to be sustained as not in violation of the Equal Protection Clause, must be based on differences reasonably related to the purposes of the act in which it is found. *Morey v. Doud*, 354 U.S. 457 (1957). In applying the Equal Protection Clause to social and economic legislation, the Court will give great latitude to the Legislature in making classifications, and the rough accommodations made by the government do not violate the Equal Protection Clause unless the lines drawn are hostile or invidious. *Levy v. Louisiana*, 391 U.S. 68 (1968); *Norvell v. State of Illinois*, 373 U.S. 420 *reh. den.* 375 U.S. 870 (1963). The Fourteenth Amendment permits the states a wide scope of discretion in enacting laws

affecting some groups of citizens differently than others, and the constitutional safeguard is offended only if the classification rests on arbitrary grounds wholly irrelevant to the achievement of the state's objective. *McGowan v. State of Maryland*, 366 U.S. 420 (1961).

Nor does the Equal Protection Clause require the Legislature to make proposed remedies to perceived evils all-inclusive; rather it allows the Legislature to proceed on a step-by-step basis. Reform effected by a statute may proceed one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind, selecting one phase of one field and neglecting others, without amounting to a legislative classification in violation of the Equal Protection Clause. *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, *reh. den.* 384 U.S. 967 (1966); *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 *reh. den.* 349 U.S. 925 (1955); *Hughes v. Superior Court of California in and for Contra Costa County*, 339 U.S. 460 (1950).

Thus, the question presented to this Court under Petitioner's first argument is whether the procedural requirement of mediation panel proceedings prior to civil trial in medical malpractice actions, and not in other tort actions, represents an arbitrary and invidious discrimination against malpractice plaintiffs or, on the other hand, whether it has some rational basis related to the legislative objective in the enactment of the statute.

The legislative purpose is reflected in the preamble of the act, quoted at pages 17 and 18 of the Petition, which acknowledges the existence of an impending crisis in the provision of adequate health care to the people of Florida. Specifically, the statute's preamble sets forth that the cost of medical professional liability insurance had "skyrocketed," and that without some legislative relief from this heavy financial bur-

den, physicians and other health care providers would be forced to curtail their practices or retire, *inter alia*, with resulting obvious adverse effects on the general citizenry of the state, and that this problem has reached crisis proportion. This Court is no doubt aware of the medical malpractice insurance crisis existing nationwide in 1975, when this statute was enacted, and of the fact that there existed a substantial probability of drastic curtailment in the availability of health care services, as a result of the bitter controversy between malpractice insurance companies and the physicians they insured, and the physicians' justifiable concern over the economic risks of continuing to practice medicine without malpractice insurance coverage. This problem was acute in Florida and, indeed, was then the subject of ongoing litigation in the United States District Court for the Middle District of Florida in a cause titled *Argonaut Insurance Co. v. Florida Medical Association, Inc.*, Docket #75-140 Civ.-J.-T. (M.D. Fla. 1975)

In that proceeding, the largest medical malpractice insurance carrier in Florida was seeking a declaratory judgment that it was legally entitled to either dramatically increase the premiums it charged for malpractice policies, or to cancel such policies on relatively short notice and cease writing malpractice insurance in the state by the end of the year. The same insurer had also filed a dramatic rate increase for its malpractice policies, which rate filing was the subject of litigation in the District Court of Appeal, First District, State of Florida, simultaneously with the Federal District Court action noted below. In the Federal District Court action, the physician-members of the Florida Medical Association brought a class action counterclaim against the insurer, seeking injunctive relief against its proposed cancellation of malpractice policies for nonpayment of the increased premiums. All of this litigation was pending and unresolved at the time

of enactment of this statute. Thus, the state's legislature was indeed faced with a crisis in health care provision, it having been made clear that numerous physicians were seriously contemplating a "doctors' strike" in the event that the insurer was successful in its litigation, an action which would have drastically diminished the availability of adequate health care services to the citizenry of Florida. Indeed, such "doctors' strikes" were being considered throughout the nation for the same reasons, and occurred in some other states. Thus, the legislative determination that a crisis in health care services existed was clearly based on fact.

Petitioner strains at gnats in asserting that the legislative findings of an imminent crisis in health care provision were limited to physicians in high-risk insurance categories, and not inclusive of other physicians and hospitals. The malpractice insurance carrier who provided the bulk of the malpractice coverage in Florida provided such coverage to the majority of the state's physicians in all risk categories (and had increased its rates across-the-board) as well as providing coverage to a great number of hospitals, whose rates had been similarly increased. All of this was known to the Legislature at the time. Notwithstanding the above, however, the crucial point remains that numerous physicians in all risk categories were discussing the advisability of a "doctors' strike," or a drastic reduction of their practices, in the absence of some legislative relief. And, of course, hospitals cannot function without doctors. The results of such actions by the health care providers on the citizenry of the state are drastic and obvious.

Faced with such a situation, the legislature moved to solve the crisis by enactment of the statute here in question, dealing exclusively with medical malpractice. The fact that the

legislature did not choose to extend the mediation panel remedy of this statute to all tort actions, but instead limited it to medical malpractice actions, where the crisis existed, is not an arbitrary or invidious discrimination, but rather is a proper exercise of legislative discretion in determining to limit the remedy to the area where the crisis was most acute and the need for relief most seriously perceived. As noted above, the legislature, in enacting a statute making classifications, need not extend the remedy to the entire field of tort law, but may enact reforms one step at a time so long as classifications are reasonable. Indeed, Florida had previously enacted certain reforms in the negligence field in the form of a "no-fault" automobile insurance law, upheld against due process and equal protection claims by the Supreme Court of Florida in *Lasky v. State Farm Insurance Co.*, 296 So.2d 9 (Fla. 1974). The legislature did not invidiously discriminate against malpractice plaintiffs by enacting this statute, but rather proceeded to enact reforms one step at a time, beginning with the area in which the crisis was most acute; if experience proves the remedy worthwhile, the legislature may well extend it to all similar cases. This step-by-step approach is clearly permissible under the equal protection clause.

Petitioner next asserts that the statute denies equal protection by providing this remedy only as to certain classes of health care providers. The discussion above is, in large part, equally applicable here. In addition, it must be noted that Petitioner is not a chiropractor or other health care provider not covered by this statute, but rather is a patient bringing a malpractice action. Thus, Petitioner is without standing to assert the rights of such persons.

Leaving aside the question of standing, Petitioner's argument is without merit. In the name of the Equal Protection

Clause, Petitioner first argues that the statute, in view of the legislative findings embodied in its Preamble, should have been drawn so as to require a malpractice plaintiff suing a physician in a high-risk specialty to proceed through mediation while making no such requirement if the defendant physician practices in a low-risk area of specialization. Does equal protection of the laws *require* that a patient suing a cardiologist must conform to different procedures than those applicable to a patient suing a general practitioner? Clearly not. Indeed, such a classification system might well be held arbitrary and capricious. Accordingly, the legislature cannot be faulted on equal protection grounds for applying the mediation panel remedy to all physicians, hospitals and health maintenance organizations.

Petitioner then seeks to maintain the logically inconsistent argument that, once the remedy has been extended to physicians, it must also be applied to dentists, chiropractors and podiatrists as well, or be unconstitutional. It must be admitted that this argument possesses some superficial appeal; yet closer analysis reveals its flaw. None of these groups were involved in the malpractice controversy and litigation described above, nor were any of these groups seriously considering a "strike" or a drastic curtailment of their practices. In short, the crisis situation which impelled the legislative response embodied in this statute simply was not applicable to these groups. Why then, would there be any constitutional requirement that they be included within the scope of the mediation panel provision, when they are not within the scope of the crisis which accounts for its enactment? There is no more reason to include dentists and chiropractors within the scope of the mediation panel provisions than there would be to include engineers, lawyers or architects, all of whom are also occasionally subject to malpractice actions. The key

determinant of whether a statutory classification denies equal protection is whether there is a rational relationship between the legislative objective (here, assuring adequate health care for Florida residents) and the classification. The Legislature here made the obvious rational choice of lines of demarcation, applying the statutory remedy to those classes--and only those classes--involved in the crisis legislation. It might be noted, however, that subsequent malpractice legislation, proceeding on a step-by-step basis, has covered additional health care providers. Ch. 76-260, Laws of Florida 1976.

It appears to be Petitioner's contention that it is constitutionally impermissible for a legislature to enact statutory remedies discriminating among various types of claims brought in the courts, and that any classification of particular types of actions (such as malpractice suits) requiring procedures to be followed which are not required in all other types of action is constitutionally impermissible. However, this Court has expressly held to the contrary.

Thus, a New Jersey statute making a holder of less than 5% of the shares of a corporation's stock, if unsuccessful in a stockholder's derivative action, liable for expenses in certain situations, does not violate the Equal Protection Clause. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Similarly, equal protection is not denied by a specific statute of limitations applicabe only to actions under a state's "blue sky laws." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 *reh. den.* 325 U.S. 896 (1945). Specific statutory limitations applicable only to certain particularized types of actions have also been upheld in numerous cases by the Circuit Courts. See, for instance, *Empire State Ins. Co. v. Chafetz*, 302 F.2d 828 (5th Cir. 1962); *Harlow v. Ryland*, 172 F.2d 784 (8th

Cir. 1949); *Wilson & Co. v. City of Jacksonville*, 170 F.2d 876 (5th Cir. 1949); *Hardware Mutual Ins. Co. v. Jacob Hieb, Inc.*, 146 F.2d 447 (8th Cir. 1945). The controlling test is whether the classification of the particular type of action has a rational basis. As noted above, the classification here in question has such a rational basis, and thus does not violate the Equal Protection Clause.

Petitioner's final equal protection argument is based upon a contention that this statute arbitrarily discriminates against plaintiffs in medical malpractice actions, and in favor of defendants, by requiring the plantiff to initially submit her claim to a medical mediation panel, while permitting the defendant to "waive" such a panel. In effect, Petitioner's argument is that both plaintiff and defendant must be accorded exactly the same procedural rights in order to comply with the Equal Protection Clause. Nothing could be further from the truth. The law is replete with situations in which different and unequal requirements are applicable to plaintiff and defendant in any action. Thus, for example, plaintiff in a civil action, but not the defendant, is given a choice of venue. See, for example, Florida Statute §§ 47.011, 47.021, 47.041 and 47.051.

Similarly, the plaintiff in any action, but not the defendant, may take a voluntary non-suit. See, for example, Fed. R. Civ. P. 41(a) and Rule 1.420(a)(1), Fla. R. Civ.P. A plaintiff having a cause of action against multiple defendants has the option of either joining all of the defendants in a single action, or filing different actions against each defendant, while the defendant has no corresponding right. In none of these instances is there any violation of the equal protection provisions of the Constitutions. If, as Petitioner argues, all parties litigant must stand on *exactly* the same footing, and be

entitled to *exactly* the same privileges, a defendant, just as a plaintiff, would have a right to take a voluntary non-suit, to choose venue, or to require that all defendants in a situation involving multiple defendants be sued in one action or sued in differing actions, at defendant's option. The fact that this is *not* the law itself argues persuasively against Petitioner's position that plaintiff and defendant in a civil action must be given exactly the same privileges and burdens. Basic equality and fairness is what is required. Accordingly, it is submitted, the mere fact that a malpractice plaintiff is required to submit her claim to a mediation panel, while the defendant is not mandatorily required to submit to the mediation panel, is not, in and of itself, sufficient to demonstrate a violation of the equal protection provisions of the Constitution.

It is in fact doubtful that any defendant can, in a strict sense, be *required* to take *any* procedural step. Thus, for instance, a defendant in a civil suit is not required to submit his defense by filing an answer to the complaint; rather, the law provides certain specified sanctions to be applied to those who fail to meet procedural "requirements," as by providing for a default against defendant in the above example. See, for example, Fed. R. Civ. P. 55(a), and Rule 1.500, Fla. R. Civ. Proc. The underlying reason, of course, is that plaintiff, who actively seeks relief from the courts, may be required to comply with certain procedures in order to obtain what he is seeking, whereas defendant, who is not actively seeking the intervention of the courts, may not be required to take affirmative action, although his failure to do so may be sanctioned by appropriate penalties. The sanction imposed upon a malpractice defendant who fails to file an answer in mediation proceedings is discussed below.

As regards this portion of the Petitioner's argument, it might

be observed that she is attempting to "have her cake and eat it too." Petitioner previously complained that she was required to submit her complaint to a mediation panel, thereby entailing delay in the ultimate disposition of her claims. Now she complains that the physician-defendant, by failing to file an answer in these proceedings, can avoid this delay, thus giving Petitioner the speedy access to the Courts of which she complains the provision deprives her. Petitioner's argument is logically inconsistent in this regard.

As intimated above, the provisions of Florida Statute §768.133 (2), allowing a malpractice plaintiff to proceed to the Circuit Court, upon failure of the defendant to file an answer within twenty days, acts as a sanction on the defendant for not complying with the mediation provisions. Thus, the mediation panel provides the defendant a means of some limited discovery of the basis of plaintiff's claim, under judicial supervision, thus giving the defendant an opportunity to evaluate the merits of the charge, in order that he might either consider the possibility of settlement of the claim or to attempt to demonstrate to plaintiff that the charges are groundless, thus (perhaps) avoiding all litigation. Where a particular claim can be shown to the mediation panel to be non-meritorious, these proceedings can allow the defendant to introduce into evidence in any subsequent court action the mediation panel's finding that he was not actionably negligent. Florida Statute §§ 768.133(8) and (9). If defendant fails to file an answer within twenty days, the statute allows plaintiff to immediately proceed to the Circuit Court, thereby depriving defendant of these potential benefits. The effect of the statute's "waiver" provisions is thus to provide a *sanction* against a defendant for failing to avail himself of the mediation provisions.

When a defendant fails to file an answer in the mediation proceedings, the Legislature imposed the sanction of depriving him of any benefit he might obtain from mediation as noted above, rather than imposing the sanction of entering a default against him. This is quite reasonable since default, under Petitioner's reasoning, would result in a factual finding (not based on any evidence, since none would have been introduced) that the defendant had been professionally negligent, which finding would be admissible in evidence in a subsequent civil suit under Florida Statute §768.133(11). Nowhere is it written in stone that the only possible sanction for failing to answer is entry of a default, although this is a commonplace method of sanctioning such conduct. See, for example, Rule 1.500 (a), Fla. R. Civ. Proc. However, in view of the limited availability of the results of mediation in a subsequent civil action, it is submitted that a failure to answer in such a proceeding is more akin to the failure of a party in a civil action to answer interrogatories, in which case the rules provide various sanctions, among which is the entry of an order prohibiting a party who fails to comply with an order compelling discovery from introducing designated matters in evidence. See, for example, Fed. R. Civ. P. 37 (b)(2)(A), and Rule 1.380 (b)(2)(A), Fla. R. Civ. Proc. It is submitted that the sanction provided by Florida Statutes §768.133 is analogous in that it precludes a defendant who fails to answer the claim from introducing into evidence a potential finding by the mediation panel that he was not negligent. Thus, the practical effect of the section is to provide a sanction against a defendant who fails to answer the mediation claim.

The wisdom of the legislative determination that this is an appropriate sanction is not here in question, just as this case does not involve the wisdom of the entire statute, but

rather its constitutionality. As demonstrated above, the statute does not violate the Equal Protection Clause, inasmuch as the legislative classification of malpractice actions as those in which the mediation panel remedy should be provided is a rational one, and not arbitrary, capricious, or unreasonable. The mere fact that a defendant who fails to avail himself of the mediation proceedings is not more heavily sanctioned certainly does not give rise to a violation of the Equal Protection Clause. Accordingly, Petitioner's argument in this regard is groundless.

POINT II

DOES FLORIDA STATUTE §768.133 VIOLATE THE DUE PROCESS PROVISIONS OF AMENDMENTS V AND XIV OF THE UNITED STATES CONSTITUTION?

Petitioner bitterly complains that the mediation panel procedures are such as to deprive her of due process of law in numerous ways. Her initial complaint in this regard is that the provisions of Florida Statute §768.133(7), dealing with the introduction of evidence in the mediation panel proceedings, somehow violate due process. However, Petitioner fails to point out that this same section provides that she may call witnesses and has the right to subpoena witnesses and evidence, just as she would in a Circuit Court proceeding. Instead, Petitioner presents a parade of horribles which, under the statute, could only come about if Petitioner totally failed to avail herself of the right to call witnesses and subpoena witnesses and evidence.

Thus, for instance, Petitioner asserts that the statute would allow the members of the mediation panel *sua sponte* to bring

in textbooks which they regard as authoritative, on the basis of the statute's provision that "other documents may be produced and considered by the panel." Clearly, such a construction of the statute is outrageous.

The clear import of this language is that the evidence may be produced by the parties and considered by the panel, not that the mediation panel members themselves may produce and then consider evidence. As noted above, Transition Rule 21(h), applicable to these proceedings, provides that the judicial referee, a Circuit Judge, has exclusive authority to rule on the admissibility of evidence, is responsible for the conduct of the hearings, and must conduct them in such manner as to best ascertain the rights of the parties. To intimate that a Circuit Judge would allow a member of a panel to bring in "authoritative textbooks" without notice to the parties and rely on them as authority for his decision is a slander on the judiciary of Florida.

Similarly, Petitioner asserts that due process is violated by the lack of any specified procedure allowing the parties to question the panel members to determine if there is any potential bias against them. In so doing, however, Petitioner overlooks the provision of the statute allowing parties to challenge panel members for cause. Florida Statute §768.133 (3). Similarly, this argument overlooks the provisions of Transition Rule 21(g), which specifies that:

> "Challenges for cause to prospective members of Medical Liability Mediation Panels shall lie whenever it appears that a prospective member has any bias or prejudice in the matter. Challenges shall be presented to the Judicial Referee and liberally construed by the Judicial Referee so as to obtain an unbiased and unprejudiced panel. A party objecting to a prospective

> panel member may introduce any competent matter to support the objection. The Judicial Referee is a judicial officer and challenges to the Judicial Referee shall be made in accordance with Chapter 38, Florida Statutes, and the Code of Judicial Conduct."

Thus, this argument is clearly without any basis. In effect, Petitioner is asserting that she should have the right to conduct voir dire of the panel, a procedure which would be much akin to giving a plaintiff in U. S. District Court the right to conduct a voir dire of the District Court Judge.

Petitioner next complains that the determination of the medical liability panel is admissible in evidence in subsequent Circuit Court proceedings. It should be noted that the statute specifies that "no specific findings of fact shall be admitted into evidence at trial" and that "[t]he jury shall be instructed that the conclusion of the hearing panel shall not be binding but shall be accorded such weight as they choose to ascribe to it." Florida Statute §768.133 (11). Thus, the determination of the panel is simply an additional item of evidence which may be presented to the jury in a subsequent civil action, with the jury to be specifically instructed by the Court that that determination is not binding, and may be given whatever weight the jury determines to ascribe to it. Petitioner asserts that the mere fact of introduction of the mediation panel determination will so overwhelm the jury as to deprive the losing party in the mediation proceeding of due process. The groundlessness of this argument is perhaps best seen by a comparison with the provisions of §5 of the Clayton Act, 15 U.S.C. §16. That statute permits a final judgment or decree rendered in any civil or criminal antitrust proceeding brought by the United States to be admitted into evidence against the defendant in any subsequent private

antitrust action against that defendant as to all matters respecting which the prior judgment would be an estoppel as between the government and defendant.

Thus, the Clayton Act provision allows a jury to consider not a mere majority determination by a Circuit Judge, an attorney and a physician, (with specific instructions that that determination is not binding and can be accorded as little weight as they desire), but rather a finding by a U. S. District Judge and a unanimous jury (perhaps affirmed by this Court) that the defendant has violated the law, and that the United States government, in all its majesty, has successfully prosecuted them and proven them guilty beyond and to the exclusion of all reasonable doubt. Yet this statute has never been held constitutionally impermissible. Indeed, it has been specifically stated that this section "does not abridge the right of trial by jury or take away any of its incidents, nor does it in anywise work a denial of due process of law. . ." *Purex Corp., Ltd. v. Proctor and Gamble Co.*, 453 F.2d 288, 291 (9th Cir. 1971) *cert. den.* 405 U.S. 1065. See also *Meeker and Co. v. Lehigh Valley R.R.*, 236 U. S. 412, 430 (1915), upholding a similar statute against such attack.

If anything, the provisions of 15 U.S.C. §16 would present far *more* of a due process problem than the provisions here in question, inasmuch as the mediation panel's findings result from a contest directly between the parties to the same proceeding, whereas the Clayton Act provision allows the findings of a court and jury in one trial to be admitted into evidence in a totally different proceeding. If a jury is overawed by the panel findings, as Petitioner asserts, how much more would they be overawed by the finding of a unanimous jury, approved by one or more members of the Federal Judiciary, that the United States government had proven beyond

a reasonable doubt that the defendant before them had violated the fundamental economic policies of the nation? Furthermore, unlike the mediation panel provisions here, 15 U.S.C. §16 expressly provides that the judgment in the government's antitrust proceeding is prima facie evidence against the defendant in the civil proceeding; the jury is not instructed that they can afford such a finding as little weight as they wish, but rather is instructed that, unless the government decree is rebutted by defendant's evidence, the private antitrust plaintiff is presumed to have met his burden of proof on the issues covered by the government's prior case.

In view of this, we are completely unable to discern how Petitioner can possibly claim that the mere fact of admissibility of the mediation panel's determination can be held to violate due process, especially since the jury is expressly instructed that such determination is not binding on them and can be given as little weight as they desire.

Next, Petitioner asserts that, if a malpractice plaintiff's action is directed against more than one health care provider, the statute would require her to go through numerous mediation proceedings before allowing her to proceed with her action in Circuit Court. Petitioner claims that this would either involve her in numerous simultaneous mediation panel proceedings or would interminably delay the filing of the civil suit by calling for consecutive mediation panel proceedings up to four months apart. This contention is simply not factually accurate. Petitioner's argument is completely based on the contention that "the act provides that the physician may be judged only by a member of his own specialty" (petition at page 30), yet Petitioner gives no authority for this contention. In plain fact, an examination of the statute indicates that this is simply not true. What the statute *does*

provide is that the parties may stipulate to the type of medical specialist who should determine the claim, but that if they cannot agree on the type of specialist, the judicial referee makes the determination. The statute clearly contemplates that the physician member of the panel be of the defendant's specialty where possible, but he may be of a different specialty in appropriate cases. The statute does not make the requirement as Petitioner asserts. Accordingly, there is simply no basis for the Petitioner's argument that multiple mediation panels for a single claim could possibly be required under the statute.

Similarly, Petitioner claims that she is deprived of due process in that the mediation panel assigned to her cause may err in the admission of evidence, or in some other regard, and that she would have no immediate remedy to rectify such error prior to the initiation of the Circuit Court proceedings. Petitioner raises the contention that the method of review of mediation panel errors available to her would be by petition for certiorari to the District Court of Appeal pursuant to Rule 4.1 of the Florida Appellate Rules. However, even the most perfunctory perusal of that rule reveals that it would not be applicable, but rather deals solely with the review of orders and determinations of administrative boards. Petitioner's method of review of asserted errors on the part of the mediation panel would be by appeal from the determination of the jury (assuming she lost in the jury trial) or, perhaps, by interlocutory appeal pursuant to Rule 4.2 of the Florida Appellate Rules. Assuming that interlocutory appeal were available as a remedy, the appealing party could properly request the District Court of Appeal to stay proceedings in the lower court pending determination of the appeal, assuming that the parties did not stipulate to a stay of the action.

Assuming, however, that interlocutory appeal is not available in these circumstances, it quite simply is not a denial of due process of law to delay appellate review of the trial court's admitting into evidence the findings of the mediation panel, so long as an adequate remedy on appeal is available. Petitioner's position, in a nut-shell, is that the possibility exists that the mediation panel would err in some regard and that the admission of the mediation panel's determination, if based on proceedings in which error was committed, is so fundamental that due process demands immediate pre-trial appellate review. Petitioner fails to point out in what regard this situation is so fundamentally different from an erroneous ruling of the trial court during a pre-trial conference as to the admissibility of an item of evidence, or as to an erroneous ruling of a trial court in any other regard. Petitioner's basic (albeit unexpressed) premise is that due process requires that she have an immediate appeal each and every time she conceives that an error has been committed anywhere along the proceedings. The law, of course, does not require this. In point of fact, the courts have been quite studious in limiting the availability of interlocutory appeals, and the situations in which interlocutory orders may be appealed prior to final judgment are quite restricted. See, for instance, 28 U.S.C. §1292(b). Yet Petitioner's argument would indicate that each limitation on the availability of *immediate* appellate review of rulings of the trial court would be violative of the Due Process Clause.

Petitioner's final due process argument rests upon an asserted "right to immediate access to the Court." (Petition at page 31). Petitioner cites no authority whatsoever for her assertion that there is a right of *immediate* access to the courts, for the simple reason that there is no such authority. If the existence of a requirement that certain proceedings be

completed prior to instituting litigation were held constitutionally impermissible, the entire doctrine of exhaustion of administrative remedies would be unconstitutional and void, since that doctrine, where applicable, requires that administrative proceedings be completed prior to any resort to the courts. See, for instance, *Pest Control Commission of Florida v. Ace Pest Control, Inc.*, 214 So.2d 892 (Fla.App. 1st 1968); *Hoffman v. Board of Control*, 172 So.2d 874 (Fla.App. 1st 1965). The Fourteenth Amendment does not in any way undertake to control the power of a state to determine by what process legal rights may be asserted or legal obligations enforced, provided that the method of procedure adopted for such purposes gives reasonable notice and affords fair opportunity for the parties to be heard before issues are decided. *Sas v. State of Maryland*, 334 F.2d 506 (4th Cir. 1964); *Shemaitis v. Reid*, 193 F.2d 119 (7th Cir. 1952). Thus, many states have incorporated within their divorce (or dissolution of marriage) statutes a "cooling-off" period, which inherently lengthens a divorce proceeding by building in a delay of several months or more. Yet, despite numerous constitutional attacks, it has never been held that such a "cooling-off" period was unconstitutional.

Numerous instances may be cited of situations in which court actions involve delays of various kinds, none of which has ever been held unconstitutional. Thus, for example, courts of equity have long had the power to refer matters brought before them to a Master (see, for instance, Fed. R. Civ. P. 53, and Rule 1.490, Fla. R. Civ. Proc.) and such reference involves delays in the processing of the cause. This has never been held to be unconstitutional as depriving a party of due process of law. Another comparable situation is that of a landowner alleging that the zoning of his real property had deprived him of its use; the law requires him to exhaust available nonjudicial remedies before bringing his action into the courts. See, for instance, *DeCarlo v. Town of West Miami*, 49 So.2d 596 (Fla. 1951); *Wood v. Twin Lakes Mobile Home Village, Inc.*, 123 So.2d 738 (Fla.App. 2d 1960). Further analogy could be made to such matters as disbarment proceedings, where substantial rights are very seriously involved, and where certain nonjudicial actions must be taken before any action may be filed in the courts of Florida. See Rules 11.04, 11.06 and 11.09, Article XI, Integration Rule of Florida Bar.

Each of these examples serves to point out the fact that there is no unmitigated and unbridled constitutional right to file an action in the courts at a time of plaintiff's own choosing. Rather, the constitutional right that the plaintiff does have is to file her action at a time of her choosing, if the time so chosen meets the requirements of applicable statutory and case law. Where the time chosen by plaintiff to file her action does not meet the requirements of statutory or case law, as where the statute of limitations has expired or the plaintiff has failed to exhaust administrative remedies, the plaintiff's action is subject to dismissal. The same is true in the instant cause. Statutory law has prescribed that before filing her action in the Circuit Court, plaintiff must first proceed through mediation procedures prescribed by Florida Statute §768.133.

It should be emphasized that the statute in question does not preclude a malpractice plaintiff from resorting to the courts following mediation, nor in any way limit, restrict or condition plaintiff's access to the courts, regardless of what the outcome of the mediation proceeding may be. The only conceivable situation in which any malpractice plaintiff could possibly be deprived of access to the court under this statute is where plaintiff has totally failed to comply with the statu-

tory requirement of submitting the claim to mediation. The statutory draftsman took great pains to insure that a plaintiff was entitled to proceed in the Circuit Court regardless of the outcome of the mediation proceeding, and further insured that the statute of limitations would not run during these proceedings. In point of fact, the filing of the claim before the mediation panel extends the statute of limitations. The only way in which a plaintiff can be deprived of access to the courts by this provision is by wilfully failing to file a claim in mediation proceedings. This, however, does not deprive the plaintiff of her right of access to the courts, any more than does the well established doctrine of exhaustion of administrative remedies.

In situations where that doctrine is applicable, the courts will dismiss a claim where the plaintiff has failed to exhaust available administrative remedies, allowing the plaintiff to proceed in court only after doing so. Similarly, if a malpractice plaintiff were to file a complaint in the Circuit Court without first proceeding through mediation as required by the Statute, the court would dismiss the complaint. The plaintiff could then promptly file the mediation claim, and, upon the determination of those proceedings, once again proceed in Circuit Court. The only possible circumstance in which a plaintiff could be deprived of access to the Circuit Court is where he allowed the statute of limitations to run before filing the claim initially; in that case, it would be the statute of limitations, not Florida Statute §768.133, which bars the claim. Clearly, Petitioner is not contending that the statute of limitations contravenes due process of law.

It is submitted that Petitioner has totally failed to show any violation of the Due Process Clause, and accordingly that her argument under this point is without merit.

POINT III

DOES FLORIDA STATUTE §768.133 VIOLATE PLAINTIFF'S RIGHT TO A TRIAL BY A JURY OF HER PEERS?

Petitioner here complains that the statute violates her right to trial by jury. Petitioner cites many cases for the proposition that no state may constitutionally deprive a plaintiff of her right to trial by jury, but totally fails to show in what way the statute here in question could ever have such an effect.

Before further responding to the Petitioner's argument under this contention, however, it should be pointed out that this question was never raised in the courts below. Rather, Petitioner's contentions below were that the statute violated the Due Process and Equal Protection clauses, as well as the Privileges and Immunities Clause and various provisions of Florida's state Constitution, none of which dealt with the right to trial by jury. Accordingly, the point not having been argued below, it cannot now be raised. *Shelley v. Kraemer*, 334 U.S. 1 (1948);; *Williamson v. Weyerhauser Timber Co.*, 221 F.2d 5 (9th Cir. 1955); *Keyes v. Madsen*, 179 F.2d 40 (D.C. Cir. 1950) *cert. den.* 339 U.S. 928. Nonetheless, we will respond to Petitioner's argument out of an abundance of caution.

Petitioner totally fails to indicate in what manner the statute here in question deprives her of her right of trial by jury. As noted above, this statute in no way tends to preclude trial by jury of malpractice actions, but merely requires a plaintiff in such proceedings to go through a mediation proceeding prior to commencement of the jury trial. It appears that this procedural requirement is the basis of petitioner's claim, in-

asmuch as she cites *Wright v. Central DuPage Hospital Assn., supra*, for the proposition that the Illinois Medical Review Panel procedure established by the Illinois statute was an unconstitutional prerequisite to a jury trial. Indeed, this is the only authority asserted in the petition for this contention. Yet, as noted above, the Illinois court did not decide that cause on the basis that the statute there in question deprived a plaintiff of her right to trial by jury--although indicating in dicta that it would so hold--but rather held, at 347 N.E. 2d 740, that the statute was unconstitutional under Illinois' state Constitution because it empowered nonjudicial members of the panel to exercise judicial functions. As noted above, such is not the case with the Florida statutes.

Petitioner's contention under this heading is that the imposition of a procedural prerequisite to jury trial is an unconstitutional impairment of the right to jury trial. Obviously, the bald statement of the contention carries with it its own refutation, since there are many procedural prerequisites before a plaintiff can obtain a jury trial. Thus, for instance, under federal rules and practice, a plaintiff must show to the court the existence of one or more genuine issues of material fact in order to withstand a motion for summary judgment under Fed. R. Civ. P. 56 and thus obtain a jury trial. Similarly, the sanction of dismissal of a plaintiiff's claim for failure to prosecute or to otherwise comply with the rules is authorized under Fed. R. Civ. P. 41(b). Both of these rules imply procedural prerequisites to the obtaining of a jury trial. Under Petitioner's argument, however, such procedural prerequisites would be unconstitutional. Clearly, this is not the case. Many similiar examples could be set forth, but the point remains the same: the mere fact that statutory law or rule imposes a procedural prerequisite to trial by jury does

not, in and of itself, unconstitutionally deprive a party of the right to trial by jury.

This being true, Petitioner's argument must be that there is something inherent in the mediation panel procedure itself which constitutes an impairment of the right to trial by jury. However, Petitioner totally fails to indicate in what matter this might be true. Both respondents and this Court are left completely in the dark as to exactly how the statute is alleged to violate the right to trial by jury. It is submitted that the solution is both simple and obvious, that there is no deprivation or impairment of the right to trial by jury.

CONCLUSION

For the reasons stated above, Respondents submit that the provisions of Florida Statutes §768.133 violate neither the Equal Protection Clause, the Due Process Clause nor the right to trial by jury, and that Petitioner has shown no compelling reason for this court to exercise its discretion pursuant to Rule 19, Rules of the Supreme Court, to grant the petition. Accordingly, it is submitted, the petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing have been furnished to Jos. D. Farrish, Jr., Esquire, 316 First Street, West Palm Beach, Florida 33402; F. Kendall Slinkman, Esquire, 316 First Street, West Palm Beach, Florida 33402; and Walter Stockman, Esquire, Holiday Office Center, 1325 N. Atlantic Avenue, Cocoa Beach, Florida 32931, Attorneys for Petitioner; Robert Shevin, Attorney General, Capitol Building, Tallahassee, Florida 32304, Attorney for State Amicus Curiae; and John E. Thrasher, Esquire, 731 May Street, Jacksonville, Florida 32204, Attorney for Florida Medical Assn., Amicus Curiae, by mail this the 22nd day of November, 1976.

ATTORNEY